Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

Case No. 79-1450

LOIS CHAPMAN

Petitioner,

-v.-

CITY OF TALLMADGE,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

Petitioner was charged in two separate Complaints with three counts of Pandering Obscenity. In case No. 78 CRB 1144 (Cuyahoga Falls Municipal Court Case Number) she was charged with se.ling the magazine **Peek Show** (City's Exhibit A) to Tallmadge Detective Thomas Walters on June 15, 1978 in violation of Section 76.11 (A) (2) of the Tallmadge City Code, a misdemeanor of the first degree. In Case No. 78 CRB 1145 (Cuyahoga Falls Municipal Court Case Number) she was charged with two counts of Pandering Obscenity. Count One charged that on July 1, 1978 Petitioner sold the magazine **Wet Dreams** (City's Exhibit B) to Detective Walters in violation of Section 76.11 (A) (2) of the Tallmadge City Code. Count Two charged her with the possession or control of the newspaper **Smut** (City's Exhibit C) and the magazine **Hung Cadets** (City's Exhibit D) with a purpose to violate Section 76.11 (A) (2) of the Tallmadge City Code in violation of Section 76.11 (A) (5) of the Tallmadge City Code. Numerous pleadings were filed below and extensive Discovery accomplished. Petitioner was afforded a detailed Bill of Particulars. Two Motions to Dismiss were filed by her, briefed and overruled. Respondent moved for and was denied a View of the Premises where the crime occurred. Petitioner filed a Motion For A Pre-Trial Order requesting the trial court to define the community to be used in designating the admissibility of evidence of contemporary community standards. The court granted this request and informed the parties that the appropriate community would consist of the Court's territorial jurisdiction.

At Trial the City's case against Petitioner consisted solely of the testimony of Detective Walters of the Tallmadge Police Department and the City's Exhibits. The testimony encompassed a detailed description of the premises known as the Avenue Bookstore (the locale of the crime) and the identification of three magazines and one newspaper purchased by the detective there. The officer's testimony revealed that the bookstore is a business location (TR. p.3) in a Tallmadge shopping center. The bookstore is divided into two sections. One offers for sale city and national newspapers (TR. p.6), paperback novels (TR. p.7), adult magazines of the **Playboy** variety (TR. p.7), magazines of the **Life** variety (TR. p. 7), candy (TR. p.7), and birthday and other cards (TR. p.7). The other section offers for sale 8mm movies (TR. p.9), Doc Johnson love products (TR. p.9), dildoes and vibrators (TR. p.10), soap in the shape of vaginas and penises (TR. p.10), electronic massage units (TR. p.10), inflatable dolls (TR. p.10), a large variety of sexually oriented magazines specifically placed by the nature of their content (i. e., couples, lesbian, heterosexual, new releases, homosexual, etc. (TR. p.10,11), vulgar greeting cards (TR. p.12), and paperbacks (TR. p.12).

There is also a cashier's counter from which the person standing behind it can view the entire store (TR. p.8). This counter also contained for sale roach clips, smoking pipes and paraphanalia (TR. p.8). Separating the two portions of the store is a swinging door variously labelled, including "No One Under 21 Permitted To Enter", "Browsing--15 Minutes Only", no refunds, Visa and Master Charge (TR. p.8). The Detective saw Petitioner in

the store on various occasions (TR. p.8) and he testified that she was behind the cashier's counter and had sold him City's Exhibits A, B, C and D as well as numerous items not introduced in evidence (TR. p.14, 15, 16). On a prior occasion Petitioner told the detective that she was the Manager of the bookstore (TR. p.14). The detective identified City's Exhibits A, B, C and D (TR. p. 16, 18, 19) and they were offered into evidence (TR. p.25). The City rested its case. Defense counsel's Motion for Judgment of Acquittal was overruled by the trial court (TR. p.86). At that time Petitioner claimed solely that **Peek Show** (City's Exhibit A) would only appeal to a bizarre or deviant sex group (TR. p.65). Her Petition has enlarged that claim to now include all the City's Exhibits. The Motion was overruled. Petitioner then proceeded to call two professors, a photographer and the Defendant in her case. Prof. Pesky's testimony was basically to the effect that items similar to the City Exhibits are available throughout the Court's jurisdiction and that a plethora of such materials which were intorudced into evidence by the Defendant were, in fact, similar thereto (TR. p.102). He also testified that there is no relation between pornography and crime (TR. p.109) and that the City's Exhibits and the Defendant's exhibits do not affront contemporary community standards (TR. p.112). These matters were testified to in his capacity as an expert. He also testified that City's Exhibit C (Smut) would stimulate the deviant group for which he thought it was intended (TR. p. 127). Katherine Broda testified that she accompanied Defense Attorney Allison to various bookstores and that the Defendant's evidentiary magazines and paperbacks were purchased in the Court's jurisdiction

and were similar to the City's Exhibits (TR. p. 151), which similarity the City stipulated to at the trial. She also identified various photographs she took showing those locations, both exterior and interior (TR. p. 148). Petitioner testified that she was the Manager of the Avenue Bookstore (TR. p.167), that she worked for the New York Avenue News Corporation for twelve years (TR. p.167), that she went to work to support her family (TR. p.168), that she went through the tenth grade (TR. p.168), that people under 21 are not allowed in the back portion of the store (TR. p.169), that she never read the City's Exhibits (TR. p.169), and that she had no prior criminal record (TR. p.172). On cross-examination she testified that she was responsible for placing the items sold in the restricted area on the shelf after delivery (TR. p.180), that there was a scheme or plan or design to determine the placement of books in separate areas of the store (TR. p.181), that the cashier had a full view of the entire back area of the bookstore (TR. p.182), that adult greeting cards were separated from the other greeting cards for placement in the back of the store (TR. p.183), that she sold several items to Detective Walters (TR. p.184), that she has worked at two other bookstores of the same type as the Avenue Bookstore in Tallmadge (TR. p.187), that she felt it is sufficient to look at the books' covers to tell the nature of the material (TR. p.191), that she was summoned into Court and not arrested (TR. p.191), and that she was properly treated by the Police and Prosecutors during the prosecution (TR. p.192). On redirect examination Petitioner testified that the adult magazines are sealed so that only the covers may be seen (TR. p.193). On recross she stated that she

was familiar with the character of the material sold in the adult section of the bookstore (TR. p.195). Dr. Lewis' testimony was mainly to the effect that in his opinion the only way to determine contemporary standards as relates to obscenity would be by conducting a survey (TR. p.202). He also testified that there is no causal relationship between pornography and antisocial behavior, and that in actuality the converse is true (TR. p.214).

Another Motion for Judgment of Acquittal after the Defense rested was overruled. The defense Exhibits were introduced into evidence. Closing Arguments were made and the Appellant was convicted on all three counts contained in both Complaints.

The Ninth District Court of Appeals, Summit County, Ohio upheld the three convictions on July 18, 1979.

The Ohio Supreme Court dismissed her appeal for lack of a substantial constitutional question on October 19, 1979. From that denial Petitioner seeks a Writ of Certiorari from this honorable Court.

RESPONDENT'S REASON FOR DENYING THE WRIT

EXPERT TESTIMONY WAS NOT REQUIRED IN THIS STATE CRIMINAL PROSECUTION FOR PANDERING OBSCENITY TO PROVE APPEAL TO THE PRURIENT INTEREST OF A DEVIANT GROUP.

While the issue presented by Petitioner is admittedly unique it is Respondent's position that it is not of such constitutional significance to warrant the exercise of this Court's discretion by granting a writ of certiorari. The Courts below have decided the issue in accordance with the applicable decisions of this Court and there are no special or important considerations justifying a review of those determinations.

Petitioner has argued throughout her Appeals that all four of the City's Exhibits introduced at her trial were meant to appeal to a bizarre or deviant sex group. Respondent has challenged the correctness of that argument in each Appellate Court. After the City rested its case her Motion for Judgment of Acquittal involved only one of the four magazines (Exhibit A, Peek Show). Exhibit C, **Smut**, deals with various types of sex, including, in part, sado-masochism. **Wet Dreams** (Exhibit B) deals somewhat with fetishes but is also directed at various other sexual groupings. **Hung Cadets** (Exhibit D) is targeted at homosexuals, as was Exhibit A. After Petitioner rested her case she then raised the deviancy argument as to all four Exhibits. One of her own experts testified that the materials would appeal to a deviant group. Exactly what is a "deviant group" has never been fully addressed but Respondent respectfully suggests that the Exhibits introduced in this particular prosecution do

not squarely fall within this category. The correctness of Petitioner's underlying hypothesis (that the City's Exhibits are directed at a bizarre or deviant group) being in error the rest of her arguments do not square logically.

Assuming, arguendo, that the materials were directed solely to homosexuals, fetishists, lesbians, and sado-masochists are all those categories the type of "bizarre deviant group" this Court spoke of in **Paris Adult Theatre I, et al., v. Slaton, et al.**, 413 U. S. 49 (1973)? Respondent contends that homosexuals and lesbians are not within that category.

The use of expert witnesses, as this Court stated in the Paris, **supra**, decision, has often made a mockery of the concept of expert testimony. Respondent's opinion is that Petitioner's trial provides a poignant example of such a mockery, one of the Defense experts being unable to determine if the dominant theme of the City's Exhibits was that of sex in various forms (TR. p.120). Petitioner produced two experts in her behalf and the record reflects that her counsel forcefully argued to the jury that the City's case was lacking experts which were needed to testify concerning the materials. Both the expert testimony and closing argument were unpersuasive to the jury. The credibility of witnesses being within the province of the jury of what utility would it have been to require an expert to testify whom the jury would be free to ignore, as it ignored Petitioner's experts?

It has often been held by this Court that experts are not normally needed in an obscenity prosecution. See **Jacobellis v. Ohio**, 378 U. S. 184 (1964); **Ginzburg v. U. S.**, 383 U. S. 463 (1966); **U. S. v. Wild**, 422 F. 2d 34 (1970), cert. den'd, 402 U. S. 986 (1971); **Kaplan v.**

California, 413 U. S. 115 (1973); **Hamling v. U. S.**, 418 U. S. 87 (1974). The above decisions have held that the obscene materials speak for themselves.

The following language from the **Paris, supra,** decision, found in Footnote 6, is that upon which Petitioner relies in her quest for a writ:

> We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

This Court had occasion to amplify upon this footnote in the recent case of **Pinkus, et al. v. U. S.**, 436 U. S. 293 (1978). This suit involved the mailing of obscene materials. The government's case in Chief consisted of the mailed materials and various factual stipulations. The defense consisted of expert testimony, surveys to demonstrate that the materials were not obscene, and comparable materials. On rebuttal the government called an expert to testify that the materials appealed to the prurient interest of the average person and to members of certain deviant groups. This court stated, on pages 301-302:

> Examination of some of the materials could lead to the reasonable conslusion that their prurient appeal would be more acute to persons of deviant persuasions, but it is equally clear they were intended to arouse the prurient interest of any reader or observer. . . Many of the exhibits depicted aherrant

> sexual activities. These depictions were generally provided along with or as a part of the materials which apparently were thought likely to appeal to the prurient interest in sex of nondeviant persons. . . Concededly, in the past we have "reserve (d) judgment . . . on the extreme case . . . where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the (particular) prurient interest." **Paris Adult Theatre I v. Slaton**, 413 U. S. 49, 56, n.6 (1973). But here we are not presented with that "extreme" case because the government did in fact present expert testimony on rebuttal which, when combined with the exhibits themselves, sufficiently guided the jury.

At Petitioner's trial one of her own experts sufficiently guided the jury in conjunction with the materials themselves. Her other expert could not testify as to whether or not the materials would appeal to deviants. The Petitioner's photographer testified that the materials were art and did not appeal to her. Though not exactly on point with **Pinkus, supra,** this matter is close enough to apply its logic, especially in light of the commercial exploitation here involved and the logical inferences that may properly be drawn from the act of pandering when considering the prurient appeal of the materials. See **Ginzburg v. U. S., supra.** Respondent suggests that the mode of the sale of the items is the best evidence of its intended appeal. In view of the manner in which the

bookstore was divided into a general goods section and an adult, over 21 section the lower courts were correct in allowing the convictions to stand. Defendants are free to bring in whatever relevant experts they desire, as Petitioner did, for whatever probative value they can convince a court or jury to attach to their testimony.

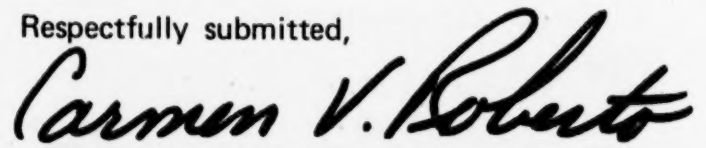
Ward v. Illinois, 431 U. S. 767 (1977) involved the sale of two obscene publications titled **Bizarre World** and **Illustrated Case Histories, a Study of Sado-Masochism.** The State's evidence consisted solely of the publications and the testimony of the purchasing police officer. Without specifically mentioning the deviancy issue this Court upheld the conviction.

This is not an extreme case falling within the category for which judgment was reserved.

CONCLUSION

The Respondent respectfully requests this Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Answer to Petition for a Writ of Certiorari was sent by regular U. S. mail to Bernard A. Berkman, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113 this 10th day of April, 1980.

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